

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GEO GROUP, INC.,	:	
Plaintiff	:	11-CV-1711(LDH)
-against-	:	United States Courthouse Brooklyn, New York
COMMUNITY FIRST SERVICES, INC, et al.,	:	
Defendants.	:	March 16, 2016 12:00 o'clock p.m.

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TRANSCRIPT OF PRE-MOTION CONFERENCE
BEFORE THE HONORABLE LASHANN DEARCY HALL
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiff:	DAVIS POLK & WARDWELL LLP 450 Lexington Avenue New York, New York 10017
	BY: GREG D. ANDRES, ESQ. ANDREW DITCHFIELD, ESQ.
For the Defendants:	CARTER LEDYARD & MILBURN LLP 2 Wall Street New York, NY 10005
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	BY: MICHAEL J. SULLIVAN, ESQ.

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5 Proceedings recorded by mechanical stenography, transcript
6 produced by computer-aided transcription.

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10 THE CLERK: Civil cause for status conference.
11 11-CV-1711. GEO Group v. Community First Services, Inc., et
12 al.

13 Counsel, please state your names for the record.

14 MR. ANDRES: Good afternoon, Your Honor. Greg
15 Andres and Andrew Ditchfield for plaintiffs.

16 THE COURT: Did you forget your name for a second?

17 MR. ANDRES: Andres, Andrew, a little similar there.

18 THE COURT: All right. Good afternoon.

19 MR. SULLIVAN: Michael Sullivan on behalf of both
20 Jack Brown, the individual defendant, and CFS, the corporate
21 defendant.

22 THE COURT: Is Mr. Lake on the line?

23 THE CLERK: No, Judge. He was away from his desk.

24 MR. BELLINGER: And, Your Honor, I'm Mike Bellinger.

25 THE COURT: I'm so sorry.

1 MR. BELLINGER: I didn't want you to take my head
2 off.

3 THE COURT: I need to ask plaintiffs does your
4 motion, your anticipated motion relate to claims against
5 Mr. Lake?

6 MR. ANDRES: It does not.

7 THE COURT: So I am correct that these proceedings
8 do not implicate Mr. Lake at all?

9 MR. ANDRES: That's correct, Your Honor.

10 MR. SULLIVAN: That's correct, Judge.

11 THE COURT: Okay. Good. Please be seated.

12 All right. This case has been around since 2011?

13 MR. ANDRES: Yes.

14 THE COURT: Just please educate me why this case is
15 five years old. Somebody. Anybody.

16 MR. ANDRES: Judge, maybe I can take a shot at it
17 and also just maybe say a word about settlement.

18 THE COURT: Okay. I had like to hear that.

19 MR. ANDRES: One of the reasons the case has been
20 around for that long is because the case was effectively
21 settled for a period of more than a year. So the parties came
22 to a settlement.

23 THE COURT: And it fell apart?

24 MR. ANDRES: By way of background, GEO is a private
25 prison group and Mr. Brown is a former employee. There's a

1 point where the settlement involved a transfer of the contract
2 that Mr. Brown and his company currently operates for the
3 Bureau of Prisons. The idea was that we would transfer that
4 contract back to GEO and that involved a variety of different
5 issues with the Bureau of Prisons, ultimately, a zoning issue
6 and a real estate issue that precluded us from settling. So,
7 for a large part of that five years, the case was actually
8 settled.

9 So, with that background, let me just say before we
10 talk about the motions, we have engaged in additional
11 settlement discussions and more recently, we've done that, and
12 I think the parties agree that the next step, we're going to
13 continue to discuss it amongst ourselves, but we think it
14 would be helpful to have Judge Go involved.

15 THE COURT: Great.

16 MR. ANDRES: She, by all accounts, is the only party
17 either in this courtroom or this courthouse that has been
18 involved since the beginning since we started with Judge Amon
19 and, frankly, different counsel on both sides at different
20 points. So, we think it would be helpful to do that, to go
21 back to Judge Go.

22 We're going to continue to speak and both parties
23 are prepared to address the issue of why we think we should be
24 permitted to file summary judgment, but what we're going to
25 ask the Court is to hold off setting a motion schedule until

1 such time as we have the opportunity to talk to Judge Go or
2 meet with her and what we were hoping to do is resolve, to the
3 extent Your Honor is agreeable, resolve the issue of whether
4 or not each party can file their summary judgment motions and
5 hold that in abeyance until May 1st. That would give us
6 enough time to go and speak to Judge Go. We would do it
7 sooner.

8 There's a conflict issue and I'll let Mr. Sullivan
9 talk about that in terms of the insurance carrier who also
10 needs to be involved.

11 So the idea would be as of May 1st, if we haven't
12 settled the case then, and we can do that today, agree to,
13 provided Your Honor agrees that we can file our motions, would
14 then just set a motion schedule to take place in the beginning
15 of early May. So we think there's some value to continue to
16 talk about settlement, in large part, because the case was
17 settled at one point.

18 THE COURT: What is the conflict issue?

19 MR. SULLIVAN: Judge, I'm Mike Sullivan.

20 The issue is that the primary person at the
21 insurance carrier who needs to be involved is out of
22 commission until I think it's March 30th or maybe it's
23 April 3rd is their first day back. I don't know the exact
24 circumstances. I don't know but I think it's something on a
25 personal level. Once he comes back, he needs a little bit of

1 time to complete and put into place what needs to be put into
2 place.

3 Mr. Bellinger just pointed out that he and I are new
4 to the case in terms of we came in in 2015, but I think
5 there's a new wind blowing between the parties in terms of
6 settlement and I am very confident that if we go down this
7 road, that there is a very high likelihood that we're going to
8 have the case settled in the time frames that we are talking
9 about and I would support the proposition that we move along
10 that line.

11 THE COURT: What about the external impediments? I
12 mean, it sounds like the parties have at least for a long time
13 been amenable to settlement but there have been external
14 impediments.

15 Are the external impediments now, have they now been
16 removed such that the Court doesn't need to be concerned with
17 that? Because I really have no interest in this being
18 Groundhog Day.

19 MR. SULLIVAN: Yes.

20 Go ahead.

21 MR. ANDRES: And just to be fair, Mr. Sullivan and
22 Mr. Bellinger effectively came in when the settlement went
23 south, but effectively the terms now would be substantially
24 different, in large part, because the contract at issue, a
25 year has gone by so it really doesn't make as much sense for

1 the GEO company to seek that contract or to get it back from
2 Mr. Brown.

3 So, since we've had that impediment with the real
4 estate issue, we've talked on a settlement basis which
5 wouldn't include the same issues that were involved in the
6 original settlement. So we've obviously all moved on from
7 that. Now we're talking about monetary issues and I think the
8 terms would just be different so that it wouldn't be Groundhog
9 Day. But, again, the backstop being that as of May 1st, we
10 basically have six weeks, but if not, provided the Court is
11 amenable, we'll file motions or we'll -- I'm sorry, as of May
12 1st, two weeks after May 1st, if we haven't come to a
13 settlement, we'll start with the motion schedule.

14 MR. SULLIVAN: It won't be Groundhog Day because
15 we're not at all dealing with a settlement that involves a
16 business plan. So this is a strictly cash deal if it's going
17 to happen which is very simple.

18 THE COURT: Yes, that's right.

19 In my short tenure on the bench, I have been loathe
20 to grant extensions with regard to dispositive motions because
21 it's my preference that I keep cases moving along
22 aggressively, however, I am persuaded by the arguments that
23 counsel have made and largely because there was a settlement
24 already and so I don't, I don't feel as if this is a situation
25 where the parties are, it's just aspirational that there could

1 be a settlement. So I think that there's at least some
2 evidence that the parties really want to resolve this.

3 So, with that, because I typically set a briefing
4 schedule at the pre-motion conference, which I think as the
5 order indicated would require opening submissions to be served
6 two weeks after the conference, we will use May 1st as the
7 operative date as if it were the date of the pre-motion
8 conference and to the extent that there is no settlement as of
9 May 1st, I guess that's May 14th or May 15th --

10 MR. ANDRES: May 15th, I believe, is a Sunday,
11 Judge. May 16th is the first Monday and then the return date
12 four weeks later would be June 13th and then the response on
13 June 27th.

14 THE COURT: Thank you.

15 MR. SULLIVAN: And May 16th is my birthday, Judge.
16 I'm sure that's relevant.

17 THE COURT: Yes, it is. You will want a birthday
18 gift of not having to file submissions. That's what you want.

19 MR. SULLIVAN: That's what I want.

20 THE COURT: Okay. So with that behind us, we should
21 probably jump in. There's significant or there is at least
22 certainly enough to jump in.

23 I want to start with the pre-motion conference
24 letter by Mr. Sullivan. I was looking for the date of it but
25 I am missing it somehow. So I would like to start with you

1 and your proposed motion seems to be first premised on the
2 notion that the claims at issue related to the Brooklyn
3 contract should be dismissed based on doctrines of collateral
4 estoppel and claim preclusion. Correct?

5 MR. SULLIVAN: Correct.

6 THE COURT: I will hear you first on that and then
7 we will move on.

8 MR. SULLIVAN: Thank you, Judge.

9 The concept here is twofold. One is that GEO has
10 already gone to forum after forum after forum and lost in
11 those forums and it would be our argument that at this point,
12 there should be a preclusion or a waiver on their continuing
13 to make the same arguments in the different forums, but this
14 case has a unique twist, Judge, and that is when they got to
15 the final forum before this forum, they withdrew the action,
16 and I would suggest there is not a lot of case law that deals
17 with something unusual like that.

18 I would suggest to the Court that this court should
19 consider dismissing those claims because by withdrawing in the
20 final forum at the time that Mr. Brown and CFS were arguing
21 that they should continue to a final adjudication on the
22 merits and that GEO said, no, we've come this far and now
23 we're going to pull the plug on it and start in a whole
24 another forum so now you have to defend yourselves in the
25 U.S. District Court instead of where we were in the Court of

1 Claims, I would suggest that that is, as I said in the brief,
2 it's a gaming of the system that the Court should not
3 countenance. We have the prior decision which was on, not on
4 the merits, obviously, it was on the pleadings, but there is a
5 great deal in Judge Ross's decision that goes to this issue.

6 Let's say GEO lost in one of those fora, that GEO
7 lost before the BOP. I would agree that, I would agree with
8 counsel that something along those lines would not necessarily
9 give preclusive effect, but we have a very unusual
10 circumstance with regard to the way things were handled by GEO
11 and it's our position that the Court could at this stage in a
12 summary judgment motion draw the reasonable inference, as
13 Judge Ross looked at but didn't have to get to at that stage,
14 but draw the reasonable inference that what really was going
15 on here was intentional anti-competitive behavior on a, by a
16 multi million, if not billion dollar corporation against a
17 small New York community-based institution that was trying,
18 trying to survive and do what it does.

19 THE COURT: Okay. I want to take this step by step
20 if we could.

21 So, yes, Judge Ross does devote a considerable
22 amount of attention to, in her opinion, to the sham litigation
23 exception and certainly, you know, she believed that there was
24 evidence that at least could support, on a motion for judgment
25 on the pleadings, the notion that litigation before the GAO

1 and the subsequent court proceedings were sham proceedings,
2 but I don't believe and I don't read her opinion to speak to
3 the preclusive nature that those proceedings have here.

4 So, one, with respect to claim preclusion, isn't it
5 the case that what I need in order to invoke the doctrine of
6 claim preclusion, I need to have the same claims to have been
7 litigated? I don't see where these claims were previously
8 litigated in any of the prior proceedings, and even before the
9 administrative agency or before a court of competent
10 jurisdiction. I don't see how we have the same claims at
11 issue such that I can invoke the doctrine of claim preclusion.

12 MR. SULLIVAN: Judge, I would point the Court as a
13 starting point to the report of the BOP. It's actually a
14 brief written by the BOP. In fact, Your Honor got it recently
15 from my office. There would be no reason you would have
16 gotten to it yet.

17 THE COURT: But I have.

18 MR. SULLIVAN: Oh, you have? Okay. Excellent.

19 In that document, the BOP in defending its decision
20 to say that there was nothing wrong with the bidding process
21 in front of the GAO, and that was eventually sustained, the
22 BOP goes through exactly the claims about whether or not
23 Ms. Meister who was a GEO employee gave or shared with Jack
24 Brown pricing information and whether or not Jack Brown used
25 that pricing information.

1 THE COURT: I'm sorry. I want to cut you off.

2 I don't want us to conflate issue preclusion with
3 claim preclusion. Right? We are going to get to issue
4 preclusion and whether or not there is an identity of issues
5 and, therefore, whether there's a preclusive effect but, and
6 what you've identified are issues in my mind, not the claims.
7 And at least when I read it, I think that GEO points out that
8 there was express language disclaiming that any of, the
9 administrative agency was taking on any of these private
10 disputes.

11 So not only do I not see evidence that the claims
12 were the same, what I see is evidence, a disclaimer that these
13 private disputes were resolved through these proceedings.

14 MR. SULLIVAN: And I would concede to the Court that
15 there is language in, throughout that entire trail saying
16 we're not resolving the private parties' dispute here and I
17 would agree with Your Honor that if one were to take the claim
18 and claim and compare them, they are slightly different in
19 terms of what the allegations are. One allegation is
20 essentially the Bureau of Prisons made a mistake in terms of
21 how it handled it and the claim here is that Mr. Brown and CFS
22 violated various duties they had.

23 So, I would concede to the Court that on a claim by
24 claim, technical preclusion basis, that perhaps I would have
25 to concede that claim preclusion is the wrong way to address

1 it.

2 THE COURT: So let's put claim preclusion over here
3 and let's assume claim preclusion does not apply. So that
4 leaves us with issue preclusion.

5 MR. SULLIVAN: Okay.

6 THE COURT: All right. Go ahead.

7 MR. SULLIVAN: With regard to issue preclusion, I
8 don't think I need to restate what I just stated but when one
9 goes through those decisions, it is absolutely at the
10 forefront with regard to whether or not information was
11 improperly taken, whether or not that information was
12 improperly used by Mr. Brown and whether or not Mr. Brown and
13 CFS got an improper advantage in using the information.

14 There's language in the -- again, it's a very
15 fulsome opinion or brief so it's very helpful as a starting
16 point in the BOP brief. They talk about whether Ms. Meister
17 gave the information, whether that information was so stale
18 that it would have been useless to Mr. Brown, the fact that
19 the information, even if it was given, was information about a
20 pricing model that became irrelevant by the end of the process
21 because GEO was constantly changing its bid and Mr. Brown was
22 constantly changing his bid and specifically points out that
23 Mr. Brown had been the person running the facility in
24 Brooklyn. So, essentially, of course he would know what the
25 staffing was and he would know all of the information that one

1 would need to make a bid and, therefore, it was not in any way
2 a reasonable inference that was promoted by GEO that there had
3 been improper stealing of information and using of
4 information.

5 Those are exactly the issues that we're dealing with
6 here, Judge. They're not similar. They're exactly the same
7 issue.

8 THE COURT: Right.

9 Didn't Judge Amon already address whether she was
10 willing to give preclusive effect to the findings made by the
11 Borough of Prisons which the findings I think you have recited
12 here? And she said then, and I think that it is the case
13 still, that you have offered no authority to say that the
14 Court should offer preclusive effect to those factual findings
15 from the Bureau of Prisons.

16 Then if you extend that further with regard to the
17 GAO, there is certainly case law that suggests that the
18 administrative decisions of the GAO should not be afforded
19 preclusive effect. So if I can't either because the Bureau of
20 Prisons findings -- certainly, I do not have anything to
21 suggest that a Bureau of Prisons finding should be given
22 preclusive effect, but then I then with respect to the GAO
23 have some authority that would suggest that it would be
24 improper for me to give preclusive effect to the findings of
25 the GAO.

1 MR. SULLIVAN: I would agree with the Court on that
2 but, again, we have a situation here where it's all of those
3 circumstances plus, plus the fact that GEO then went to
4 another forum and withdrew their claims.

5 THE COURT: The malicious prosecution aspect of it
6 and the kind of serial filing of administrative proceedings
7 and the findings of the Bureau of Prisons with respect to that
8 claim, the finding of the GAO with respect to that claim, I
9 think that that certainly provides the Court with evidence
10 that it must consider for the purposes of determining whether
11 or not there is a malicious prosecution claim can or cannot be
12 sustained as a matter of law, but we're talking about now not
13 whether those proceedings are used to support a malicious
14 prosecution claim, but whether the finding of those
15 proceedings should be given preclusive effect such that they
16 bar the plaintiff from pursuing its other claims or its claims
17 against the defendants.

18 I'm not seeing evidence that the law supports the
19 notion that preclusive effect should be given to the Bureau of
20 Prisons or the GAO.

21 MR. SULLIVAN: I understand exactly what the Court
22 has asked me.

23 Put aside our affirmative claim with regard to
24 malicious prosecution, put that totally aside, only the
25 question of whether or not the case should be dismissed or

1 that portion of the case. I would suggest to the Court and we
2 would argue in our motion that the same line of activity
3 leading to a withdrawal should preclude the plaintiff from
4 being able to now go into a new forum and, therefore, the
5 Court, with its equitable powers, can say you can't keep doing
6 this, we're not going to allow your claim to go forward.

7 Put aside whether Mr. Sullivan is ever going to get
8 a dollar on his affirmative claim. I'm not even talking about
9 that now. I am talking about our argument to this Court and I
10 cannot give you a citation where a court has done this because
11 it's a very unusual set of facts and circumstances.

12 I would argue to this court that although none of
13 the particular decisions anywhere along the line would
14 individually have preclusive effect that would require a
15 dismissal, I'm not conceding that, but let's assume for the
16 sake of argument that that's correct. I would argue that,
17 collectively, when you put them all together and then you have
18 a final forum where finally these issues were potentially
19 going to be decided by a court and then there's a withdrawal
20 and a re-filing elsewhere, I would suggest to the Court that
21 Your Honor would have the power to dismiss those claims as a
22 matter of -- I don't, Your Honor, I don't --

23 THE COURT: But that's the problem. You can't
24 finish that sentence. As a matter of?

25 MR. SULLIVAN: I don't know what to call it. As a

1 matter of fairness and justice.

2 THE COURT: But there is no doctrine that supports
3 that, right? There is no doctrine that says that because he,
4 the plaintiff here -- sorry, it's an "it" -- proceeded with
5 these administrative proceedings unsuccessfully, that I
6 should, without considering the merits of the claims, just say
7 you don't succeed here. Based on what? I don't have issue
8 preclusion. I don't have claim preclusion. I just say you
9 shouldn't be here. There's no doctrine that applies.

10 Now, certainly, there is a claim that you all have
11 brought for malicious prosecution which, in fact, does capture
12 the conduct that you complain of with respect to kind of
13 pursuing these proceedings and whether it be an administrative
14 agency or a court, it seems that that conduct is captured by
15 your malicious prosecution claim and if the case were to
16 proceed, the jury would then be able to make a finding with
17 respect to whether there is evidence to support the other
18 claims.

19 MR. SULLIVAN: Your Honor, I would suggest this.
20 Let's assume that that stream of activity was in some manner
21 wrongful. Maybe it falls into the box of malicious
22 prosecution, but I would suggest that it also falls within the
23 box of you can't do that and the Court should have the power
24 to say even if it -- let's assume in the elements of malicious
25 prosecution, the jury finds just not enough to show that it

1 was at a high level of intentionality to give damages.

2 I would suggest that you might have a slightly lower
3 standard for the Court to say I see gaming of the system here
4 such that I'm not going to allow the plaintiff to have the
5 benefit of using the system to now recover millions of dollars
6 against the defendants, even though the jury maybe didn't get
7 to the level of giving the defendants damages on that basis,
8 but there would be enough for the Court and perhaps it's a new
9 doctrine, Your Honor.

10 THE COURT: It is. And I was confirmed about four
11 months ago and when I attended my hearings, they asked me
12 questions about my willingness to create new law and I told
13 them I wouldn't do it. Right? My job is to interpret the law
14 that exists. I don't have the ability to make new law and you
15 have not provided me with a legal doctrine that would allow me
16 to do what it is that you are asking me to do.

17 MR. SULLIVAN: Okay. Well, first of all, you have
18 been appointed now so you --

19 THE COURT: So I can go rogue? Isn't that a high
20 crime of misdemeanor?

21 MR. SULLIVAN: You don't have to worry about
22 answering questions like that. But, no, I would suggest to
23 the Court that I believe -- look, this was a three-page
24 letter. I believe that we're going to be able to put together
25 an argument for Your Honor that will fit it within the

1 doctrines of --

2 THE COURT: I think you are going to put together an
3 argument and I think it is highly unlikely that you are going
4 to be able to provide me with an argument that makes your
5 argument fit within the doctrine of issue preclusion or claim
6 preclusion. Claim preclusion, certainly not. Issue
7 preclusion, I do not see how you are going to be able to do
8 that. It does not seem consistent with any of the law on this
9 point and this isn't a situation where you are going to be
10 able to supply me with additional evidence that came out in
11 discovery or something.

12 At the end of the day, the doctrine is what the
13 doctrine is. You don't have any authority that's going to
14 allow me to give preclusive effect to the Bureau of Prison's
15 decision. I think if you could have, you would have before
16 Judge Amon. I don't think you are going to be able to provide
17 any authority that is contrary to the cases that have been
18 cited by GEO with respect to determinations made by the GAO
19 and then I think, we haven't gotten to it, but that you are
20 going to have some issues with respect to the identity of
21 issues and the decision in or the determinations made by the
22 Court of Federal Claims.

23 I say this to you because if this case proceeds, I
24 would like for us to make sure that we are expending our
25 resources wisely because to the extent that you are making an

1 argument that you know does not fit at all with the law, then
2 you are just asking the Court to kind of spin its wheels and
3 you are spinning your wheels as well. I cannot stop you from
4 making the motion but we have looked through it. I looked
5 through it. I spent a lot of time reading the decisions to
6 try and see if I could find the identity of issues that was
7 necessary, to see if I can find a basis for the Board of
8 Prison's opinion to have some type of preclusive effect. I
9 haven't found it and I think that the absence of any -- I
10 realize it's only a three-page letter, but I think the absence
11 of any law on this suggests to me that it is very likely that
12 you don't have any authority. If you have it, certainly you
13 will cite it to me, but have some. Don't ask the Court to
14 make new law, please.

15 MR. SULLIVAN: I thought it was going pretty well.

16 No, Judge, here's my suggestion on this. I would
17 never file anything that I thought was wasting my time or the
18 Court's time. I would suggest that we have a good faith basis
19 for believing that there should be a doctrine that covers
20 this.

21 THE COURT: You understand why I chuckle, that there
22 should be a doctrine, a good faith basis to believe that there
23 should be a doctrine, not a good faith basis to believe that
24 there is a doctrine to cover this.

25 MR. SULLIVAN: Understood. I'll tell you what. I

1 will take what Your Honor has said very carefully before we
2 file such a motion, but if we do file it, I would say that
3 we're doing it only because we believe that it should be the
4 case and I would go back to the idea that although there are
5 affirmative claims that would be cognizable if this was a
6 wrongful series of events, I think there should be defensive
7 claims as well.

8 THE COURT: Right. Okay. I don't really --

9 MR. ANDRES: I don't really need to say anything,
10 Judge. Thank you.

11 THE COURT: Okay.

12 Mr. Sullivan, you are not done. So let's talk
13 about, you have an argument in your letter that talks to or
14 speaks to the notion that GEO has no facts to show that the
15 per diem pricing information was used by CFS or Brown to their
16 advantage.

17 I have not been on this case long, certainly not as
18 long as Judge Ross, but is the scope of Geo's claims limited
19 to the per diem pricing information with regard to the unfair
20 competition appropriation? Because as I read the complaint,
21 the per diem pricing information was one of, I think, three or
22 four categories of information that was said to have been
23 unfairly used or misappropriated.

24 I say this because what you are asking the Court is
25 for me to make a finding as a matter of law. Obviously, I

1 cannot resolve any issues, but if there is an issue of fact, I
2 am constrained and I am unable to grant a motion for summary
3 judgment.

4 So even if I assume that you are correct, and I
5 suspect that GEO may take an issue with this, that it is
6 undisputed that there is no evidence or facts to show that the
7 per diem pricing information was used, what do I do with the
8 other categories of information that I believe provide the
9 foundation for the unfair competition and misappropriation
10 claims?

11 MR. SULLIVAN: Judge, I would suggest that at the
12 time that the complaint was drafted and filed, it was a very
13 different circumstance than where we are now having done all
14 the discovery and in a nutshell, Your Honor, what you would,
15 what you'll see in the papers, I'm assuming, is the following.

16 There is an individual named Carol Kichen.

17 THE COURT: Yes.

18 MR. SULLIVAN: Carol Kichen is a big writer.

19 THE COURT: She was the third-party person who wrote
20 the bid on behalf of CFS and Brown, correct?

21 MR. SULLIVAN: Correct. And she wrote the bid for
22 CFC which was the --

23 THE COURT: Predecessor.

24 MR. SULLIVAN: -- predecessor company where
25 Mr. Brown was working which was bought by GEO.

1 So, what the discovery has shown is that all of
2 those bids look alike. It's sort of, like, a plea agreement.
3 Ninety percent of it is boilerplate and there's the little
4 part that applies in the particular case. All of the
5 discovery has shown only that these bids look alike because
6 all bids look alike and GEO claims that Ms. Meister turned
7 over this specific pricing information. There's a factual
8 dispute about that. There's no question Mr. Brown says, no,
9 she didn't, and Ms. Meister testified, yes, I did. The only
10 thing that she talks about, talked about turning over was this
11 per diem pricing information that was going to go in the bid.

12 When you see these bids, Judge, they're, you know,
13 it's 30 pages long and it has all kinds of information with
14 regard to staffing and all of that is information that the
15 evidence -- it's undisputed that Mr. Brown ran the facility.
16 He knew what the staffing was. He knew how many people worked
17 there. He knew who worked in what. It was not an enormous
18 facility. I think it's 150 beds. It's not a 10,000 person
19 prison.

20 So, the evidence will be undisputed, I would
21 suggest, that everything else essentially in that bid is
22 information that either Mr. Brown could get publicly or he
23 knew himself. The only pricing information that he wasn't
24 privy to was this per diem pricing information that they say
25 was turned over and it's our position, for essentially the

1 same reasons that was in the BOP brief, it's our position that
2 there's nothing in the record that supports the notion and, in
3 fact, everything in the record is undisputed that he wasn't
4 able to use the pricing information in any kind of useful way.
5 In fact, I think the BOP -- and I'm not talking about
6 preclusive effect. I'm just talking about explaining effects.

7 The BOP says if Mr. Brown had wanted to undermine
8 GEO's bid, he would have done it by a few dollars per day and
9 taken advantage of as much money as he could have gotten out
10 of it and the fact of the matter was that BOP's bid was
11 16 percent higher than Mr. Brown's bid.

12 So, I believe that the categories of information and
13 material that are in the complaint are not going to be
14 sustained as having any factual basis for being useful
15 information that was somehow something that Mr. Brown got and
16 prated on when he filed his own bid. Will there be
17 information that Carol Kichen, who put the bid together, was
18 perhaps, one could infer, that she was operating with the old
19 copy of the five year old bid? Perhaps, but there's no,
20 there's no facts and nobody has suggested any facts that show
21 that that was any advantage to the bidding process.

22 So, the only thing we're talking about, at the end
23 of the day, when you look at all the discovery, is this issue
24 of the pricing information for the per diem and I would
25 suggest that Your Honor could make a decision on undisputed

1 facts that there's no evidence that it was used. The burden
2 of proof is on the plaintiff obviously. They get the benefit
3 of the doubt in a motion like this, but they've got to come
4 forward with something that shows that there was actual
5 improper use and harm and none of the facts support that.

6 MR. ANDRES: Judge, just briefly, we dispute all
7 those facts.

8 So, the contract was won by Mr. Brown because his
9 price was lower. He knew GEO's price. It's a central issue
10 here. He knew not only the price, and the record about it is,
11 there are any number of different factual disputes with
12 respect to that, but in addition to price, there's staffing,
13 there are other issues. Mr. Sullivan said Mr. Brown knew all
14 that. He knew all that because he was working for GEO during
15 the time. He had access to all of GEO's confidential
16 information. He was responsible for helping GEO submit its
17 own bid to, to the BOP.

18 Now, mind you, there are two contracts, right?
19 We're talking, first, there's the Bronx contract.

20 THE COURT: There's a 2006 contract and the 2009
21 contract?

22 MR. ANDRES: Correct.

23 Mr. Brown has admitted in his deposition that in
24 2006, while employed by GEO, he submitted an application to
25 compete with GEO for that very facility in the Bronx. The BOP

1 ultimately questioned his ability to pursue that application
2 and he withdrew it. He did the exact same thing in 2009, mind
3 you, with one exception.

4 THE COURT: But I just want to be clear. Your
5 unfair competition claim is not based on conduct related to
6 the 2006 contract, right? It is related to the alleged
7 conduct in regard to the 2009 contract, yes?

8 MR. ANDRES: I think it's with respect to both.

9 THE COURT: Is it?

10 MR. ANDRES: I'm sorry. Count One is just with
11 respect to Brooklyn. I'm sorry, Judge, you're right, just the
12 2009.

13 THE COURT: All right.

14 MR. ANDRES: But in any case, he was aware of the
15 pricing information which is a crucial fact and there are
16 other issues aside from just the pricing, whether it's
17 staffing, whether it's design, it's a whole host of issues
18 that he had access to.

19 With respect to Ms. Kichen, she wasn't an expert or
20 doesn't purport to be an expert. Anything that she was
21 writing -- and, yes, she absolutely worked for CFC. Anything
22 she was writing in that bid application came from Mr. Brown
23 and she testified to as much. So she's getting her
24 information. She's effectively working as, not as a prison
25 expert, as somebody who is effectively the scribe who's

1 writing the applications. She's getting the information from
2 Mr. Brown and then putting the information in the bid.

3 THE COURT: Right. This question of use and, you
4 know, the theme of whether this information was used comes up
5 and is an issue in both of the proposed motions for summary
6 judgment and both of you all are telling me that there is not
7 going to be an issue of fact on that for different reasons,
8 but doesn't that in and of itself suggest that there is an
9 issue of fact on that?

10 MR. ANDRES: Well, I would say something slightly
11 different, Judge, which is we don't think that the issue of
12 price, which is what Mr. Brown is talking about, precludes us
13 from seeking summary judgment because of the other categories
14 which you've mentioned.

15 So, we could rely on those categories outside of
16 price which I think there would be no dispute of fact and we
17 could seek summary judgment on that ground that other than
18 price, there were other factors that Mr. Brown gained unfairly
19 from GEO and that those facts are not disputed.

20 THE COURT: And it's not disputed that he used those
21 other categories of information in connection with the
22 preparation of the bid proposal?

23 MR. ANDRES: Well, I'll let Mr. Sullivan speak to
24 that, but there's no question that he had access to that
25 information and that it would have been relevant for his

1 application for the contract.

2 THE COURT: And I know I'm skipping ahead a little
3 bit, but in order for me to grant you summary judgment on the
4 unfair competition claim and, indeed, on the misappropriation
5 of confidential information claim, and we could go through the
6 others because I think it does implicate the others, some
7 others as well, I would have to find use, correct?

8 I mean, in order to sustain the claim, I would have
9 to find that there was use of this information in the
10 proposal?

11 MR. ANDRES: Yes, that's correct.

12 THE COURT: Okay.

13 MR. SULLIVAN: And, Judge, I think I did 20
14 depositions in this case. There is no evidence of use and
15 perhaps counsel could address that. It's not my position to
16 ask him in this setting, but I think if Your Honor were to
17 question him, I don't think there's any evidence of use
18 anywhere in the case.

19 THE COURT: I mean, in order for you to be
20 successful on your motion for summary judgment on those
21 claims, obviously, you would have to be able to proffer some
22 information that would suggest to me that there is no question
23 with regard to the use element of those claims and I am
24 supposing that if you intend to bring such a motion before the
25 Court, you are doing so because you expect to proffer such

1 evidence.

2 MR. ANDRES: Understood, Judge, yes.

3 THE COURT: Okay.

4 Mr. Sullivan, it appears to me that my concerns with
5 regard to the scope of the information at issue, at least that
6 there seems to be some disconnect. GEO contends that the
7 information, you say it is limited to just the per diem
8 pricing information.

9 It seems to me that GEO is contending that there is
10 other information beyond just the pricing information that is
11 consistent with the complaint. You are saying that that was
12 narrowed by the discovery. It will have to be borne out in
13 the moving papers, but I caution both of you that the Court
14 will not endeavor to resolve issues. I can't do that here.

15 It seems to me that there certainly are disputed
16 issues with regard to the use of information unfairly, that
17 is, Geo's proprietary information that may have been
18 misappropriated by or alleged to have been misappropriated by
19 CFS and Brown. So, for the purposes of a motion for summary
20 judgment, as I am looking at this, I am seeing some difficulty
21 in how it is that either party expects me to be able to
22 resolve that issue at this juncture.

23 I am going to put a pin in the malicious prosecution
24 argument for a moment and I am going to move, if I can, to
25 GEO's proposed motion for summary judgment on its claims so

1 that at least the discussion is consistent.

2 So, I want to be clear. With regard to GEO's
3 affirmative claims against CFS and Mr. Brown, which claims
4 specifically would be subject to the motion for summary
5 judgment? It is a little unclear to me. I exempted I think
6 the last five claims believing that, and I think we cleared
7 that up in the beginning, that those implicate Mr. Lake and
8 those would not be the subject of any motion.

9 Correct?

10 MR. ANDRES: Judge, we would be moving for summary
11 judgment on all the claims absent the ones that implicate
12 Mr. Lake. They are in many respects related. They are all
13 some form of business tort.

14 The facts I believe are largely undisputed or at
15 least the relevant facts are, as Your Honor has said.
16 Mr. Brown previously worked for CSC. He later came to work
17 for GEO. During the time that he was at GEO, he bid for the
18 Bronx contract. He's admitted that that was a violation of
19 GEO's, that it was conflict of interest and a violation of
20 his, of the code of conduct. So, in terms of, for example,
21 Count Four which relates to breach of fiduciary duty, we
22 believe that the facts with respect to those are undisputed.

23 Mr. Brown also made both false statements to GEO
24 about what other competition was available and took certain
25 action to undermine the reputation and integrity of GEO with

1 local political figures which was a relevant fact.

2 So, again, for the purposes of fraud and the
3 misrepresentation, based on his admissions in his deposition
4 that he was engaged in this conduct, we think we can prevail
5 on those issues as well.

6 THE COURT: I think that the breach of fiduciary
7 duty claim, for example, I don't think suffers from the same
8 concerns that I have regarding what seems to be a very obvious
9 dispute of fact, this use issue, which I think implicates
10 Counts One, Two and Three as I see the question of use being
11 an issue that must be resolved that I think is going to be
12 disputed.

13 Look closely at the claims and please refrain from
14 bringing it if we're just going to trot out the allegations,
15 but at the end of the day it becomes apparent that there's
16 going to be a genuine issue of fact here because, again, we're
17 just doing this unnecessarily.

18 MR. ANDRES: Understood, Judge.

19 Just as well with respect to Mr. Brown's
20 discrimination claims, Mr. Brown is not able to show any
21 adverse --

22 THE COURT: We're going to get to those.

23 MR. ANDRES: Okay.

24 THE COURT: With respect to the diversion of
25 corporate opportunity claim, in order for me to grant a motion

1 for summary judgment on corporate opportunity claim, I would
2 need to be able to make the finding that the opportunity
3 should be deemed an asset of the corporation.

4 If I read your letter correctly, you are suggesting
5 that it is going to be your expert's testimony that's going to
6 allow me to make the determination that, in fact, this was an
7 asset of the company as a matter of law.

8 MR. ANDRES: Just one second, Judge.

9 (Pause.)

10 MR. ANDRES: Judge, the reason that we're asserting
11 that claim is effectively, had Mr. Brown not been, during the
12 time that he was an employee, working to bid on that contract,
13 it would have been an asset of GEO as a matter of law because
14 they would have been the only bidder that was actually
15 applying for the contract. There was no other competition.
16 And absent Mr. Brown's misconduct in terms of developing his
17 application and submitting it, absent that, we would argue
18 that that was, in fact, a corporate asset of GEO's.

19 THE COURT: Was there any third party discovery on
20 this point? I mean, it's the Bureau of Prisons who makes the
21 order. I'm just curious whether or not there is any evidence
22 on the record outside of your expert opining that they
23 believed that you would ultimately have gotten it saying, yes,
24 if they weren't in it, we would have given it to --

25 MR. ANDRES: Judge, just so I'm accurate, as I sit

1 here, I can't remember what the record says specifically. I
2 don't think that either of the parties dispute that these were
3 the only two parties and we may have learned that in the
4 context of negotiations with the Bureau of Prisons in the
5 litigation.

6 So, I believe that we understood that during --
7 after GEO didn't get the contract, there was a meeting with
8 the Bureau of Prisons. I think it was made clear to us at
9 that point that we were the only other bidder but in either
10 case, we understand that that's a fact we would have to prove
11 and certainly would be in a position to do that.

12 MR. SULLIVAN: Judge, can I answer that? The direct
13 answer to your question is there wasn't no third party
14 discovery. I wasn't in the case at the time, but I believe
15 that the Bureau of Prisons refused. I think there was perhaps
16 even a motion saying that they couldn't be deposed on the
17 issue. Mr. Ditchfield is furrowing his brow, so I don't know.

18 I don't think the BOP ever weighed in on that
19 question. We have an expert who says the opposite. We have
20 an expert who says if it had gotten down to one bidder, the
21 normal procedure is the BOP would have gone back and done
22 another request for bids or they would have handled the
23 situation quite differently. So it's absolutely not certain
24 and there would be a huge dispute about whether or not GEO
25 would have gotten the contract absent Mr. Brown's

1 participation.

2 MR. ANDRES: I don't want to talk past each other.
3 My point was simply that, I think, as a factual matter, there
4 was not another bidder aside from just CFS and GEO. Whether
5 there would have been another, I wasn't addressing that issue.
6 I wanted to be clear.

7 THE COURT: No, no, no, that's fine, but
8 Mr. Sullivan's point goes to my point which is you are going
9 to have to make a showing to me that it was an asset of the
10 corporation and that if CFS and Brown weren't in the picture,
11 it would have been yours and at least to me, as I read it, I
12 said given the fact that what we are talking about here is
13 RFPs or, you know, bids to the government, it is hard for me
14 to fathom how -- it's not, you know, the typical context of a
15 corporate asset that you typically find. This is a case where
16 you were trying to get, you were the incumbent, but you were
17 trying to get this new business.

18 MR. ANDRES: Judge, we take your point. I don't
19 want to waste your time. I think we're relying on the case
20 law that talks about tangible expectancy and that there is
21 case law with respect to that that suggests that that's enough
22 to argue that it's an asset of the corporation, but we'll
23 certainly take the Court's guidance on those issues.

24 MR. SULLIVAN: And, Judge, just to finish this line,
25 our expert has opined and testified and written a report that

1 says if the BOP is down to one bidder, then they go into a
2 whole process of requiring that bidder to prove what their
3 level is in terms of profit and how they came up with the bid
4 number. So the basic idea is if it's competitive because
5 there are at least two bidders, then they take the best price
6 and make sure that everybody can do the job. If it's not
7 competitive, it's a totally different process and the evidence
8 here shows that GEO was taking a 35 to 40 percent profit which
9 probably would never have gotten past the BOP, but that's
10 certainly not something the Court can resolve on a summary
11 judgment motion.

12 THE COURT: With respect to the cross claim,
13 Mr. Andres, in terms of the reliance aspect, at least as I
14 read the allegations as they were presented in your complaint
15 versus the way in which it has been cast in your letter with
16 respect to the fraud and the misrepresentations and the
17 reliance, in your letter at page three, you say, GEO
18 justifiably relied on these misrepresentations and omissions
19 to its detriment by hiring and continuing to employ Mr. Brown
20 as vice president of community corrections.

21 So, for purposes of your fraud claims and the
22 reliance, is this limited to the fact that you relied on his
23 misrepresentations or omissions so that you kept hiring him as
24 opposed to the way it is cast in your complaint?

25 You say that you relied on him and, therefore, there

1 was use of your material in connection with the bid. The two
2 are very different and certainly, you know, one implicates the
3 use question that keeps coming up and one does not implicate
4 the use question in terms of the motion for summary judgment
5 and me trying to determine, I think, whether it's really
6 susceptible or ripe for a motion, resolution for a motion on
7 summary judgment.

8 MR. ANDRES: So, Judge, what we're relying on in the
9 fraud claim are representations that Mr. Brown made in terms
10 of his omission with respect to the Bronx contract, that he
11 didn't tell the company that he had competing businesses, that
12 he didn't tell the company which, again, is a fact, that he's
13 admitted and has admitted competing with GEO in 2006.

14 With respect to Brooklyn, there were false
15 statements about -- he was asked specifically whether there
16 were other competitors. He also during the time was himself
17 seeking community support from local politicians and local
18 community leaders at a time that he was required to do that
19 for GEO and failed to do so. So, the argument does not
20 necessarily rely on the use information but, rather,
21 Mr. Brown's statements with respect to competition and with
22 respect to what he said he was doing and not doing vis-a-vis
23 his responsibility for those contracts.

24 THE COURT: And you relied on those representations
25 for what?

1 MR. ANDRES: Relied on those representations, for
2 example, we were told that there were not any other
3 competitors for the, for the Brooklyn facility, for example,
4 so we relied on that in putting together our material,
5 deciding what to propose as part of the RFP, to decide whether
6 or not we should change our price in terms of the details of
7 our contract.

8 Certainly, with respect to the issues of community
9 support which is a requirement, we were relying on Mr. Brown
10 to get those letters and he failed to do so.

11 THE COURT: Okay.

12 MR. SULLIVAN: Judge, respectfully, there's not even
13 a pass-the-red-face-test argument that the fraud had any kind
14 of detrimental reliance. They made their bid. Within very
15 short order, they knew that CFS was bidding alongside of them
16 and they could do whatever they wanted to do with regard to
17 price or not with regard to price.

18 THE COURT: Okay. You know, I am doubtful as to
19 whether or not this is going to be something I will be able to
20 decide on a motion for summary judgment.

21 Part of the reason why I like to have a pre-motion
22 conference is so that we can narrow the scope of any motion
23 for summary judgment and in this case, what I have before me
24 are parties -- I don't know, we have 15 counts here. It seems
25 to me at least a series of issues of fact that are in dispute,

1 but I have the proposed motions that would go to every client.

2 So, part of this exercise for me was to highlight
3 for you all at least how it is that I am approaching this and
4 that before the parties make their submissions, and now maybe
5 we will never get to that point, that you all are mindful of
6 what the purpose is of a motion for summary judgment, what the
7 limited role is that I have at this point, so that we are
8 effectively using the Court's time.

9 There have been a lot of opportunities for the
10 parties to kind of just try allegations. I have read it. I
11 have read the motion to dismiss. I have read the motion for
12 judgment on the pleadings before Judge Ross. So, I am
13 familiar with the parties' positions. If you all have
14 arguments that you all want to make on a motion for summary
15 judgment just so that you can have an opportunity to kind of
16 preview your arguments for me, it is probably not a good use
17 of any of our time.

18 This has been helpful to me though but, you know, I
19 would say that you exercised some restraint in the preparation
20 of your papers and I don't believe that the letters that are
21 before me suggest that you had intended to kind of do so. I
22 am not precluding you. I would never say I am precluding you
23 from moving on any basis, but I would like for us to just move
24 smartly to the resolution of the issues that we can because I
25 certainly would like to get rid of claims that do not need to

1 go to a jury, where I can decide them as a matter of law and I
2 believe that some of them exist here. I certainly do.

3 I think that there are probably going to be some
4 claims here that the facts will allow me to decide as a matter
5 of law, but many of them, I don't think that is the case.

6 Is there anything that the parties wanted to raise
7 with the Court before we conclude?

8 MR. ANDRES: No. Thank you, Your Honor.

9 MR. SULLIVAN: No, Your Honor.

10 MR. ANDRES: Thank you, Judge. That was very
11 helpful.

12 THE COURT: Thank you. I appreciate your time.
13 (Matter concluded.)
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17 * * * * *

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19
20 I certify that the foregoing is a correct transcript from the
21 record of proceedings in the above-entitled matter.

22 /s/ Charleane M. Heading

March 29, 2016

23 _____
CHARLEANE M. HEADING

DATE

24

25